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Essay

Natural Resources and the Making of Modern Indian Law

BETHANY R. BERGER

The pipeline protests at Standing Rock continued a long tradition of Native people coming together to protect natural resource rights. Indeed, this Essay argues, natural resource disputes are responsible for core advances in Native peoples' rights in the twentieth century. Although there are many examples, I focus on four particularly influential disputes. First, in 1905, at the height of an aggressively assimilationist federal policy, United States v. Winans preserved and expanded principles of treaty rights and preemption of state law. Next, in the 1920s, Pueblo struggles over water catalyzed new federal Indian policies that turned away from assimilation and toward tribal self-determination. Then, in the 1960s, a resurgent struggle for off-reservation fishing rights both created powerful judicial precedents and initiated a new era of pan-Indian activism and federal Indian policy. Most recently, the global indigenous struggle against natural resources exploitation by states and multi-national corporations was decisive in moving international law to recognize indigenous rights as human rights.

The resurgence of rights of tribal nations is about much more than natural resources. Indigenous peoples have always struggled for self-determination broadly defined; understanding them solely through traditional resource use denies that self-determination. But the pivotal role of natural resource struggles is not a coincidence. Because so many indigenous groups built key parts of their cultures around resource use, natural resource claims have helped reinvigorate sometimes-frayed tribal bonds and identities. Although rooted in tradition, these struggles have also been uniquely generative, inspiring new forms of protest and creating new coalitions and organizations. In the twentieth century, as all peoples have become more concerned about environmental change, these tribal claims met unusually sympathetic courts and lawmakers. This combination of distinctly motivated indigenous action and distinctly receptive non-indigenous audiences helped create principles and policies that benefit tribal peoples in areas far removed from natural resource use. At the same time, the threat of climate change and habitat destruction

*make increasingly clear how the principles that preserve tribal natural resource use
redound to the benefit of us all.*

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Natural Resources and the Making of Modern Federal Indian Law

BETHANY R. BERGER*

INTRODUCTION

In 2016, thousands of Native people and their supporters traveled from across the country to protest construction of the Dakota Access Pipeline (“DAPL”) in North Dakota.¹ It was the greatest display of unified Indian activism since the standoffs at Alcatraz and Wounded Knee in the 1960s and 1970s.² The protests, and their violent suppression by pipeline employees and state police, captured national media attention, creating renewed awareness of indigenous people’s issues.³ The protests ended in defeat: although the Obama administration reversed its approval of the pipeline, directing further consideration of the Sioux claims, the Trump administration quickly reversed again, and the pipeline was completed.⁴ A federal court later ruled that the Federal Environmental Assessment had insufficiently considered the impact of environmental justice and treaty rights on the pipeline⁵ but declined to enjoin the already completed pipeline.⁶

Although the protests did not stop the pipeline, they may have initiated a new era in American Indian political power. Native candidates ran in record numbers in the 2018 midterms and made historic gains.⁷ Voters sent

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¹ Dan Gunderson, ‘*Not Invisible Anymore*’: *Standing Rock a Year after Pipeline Protests*, MINN. PUB. RADIO NEWS (Sept. 13, 2017), <http://www.mprnews.org/story/2017/09/13/standing-rock-nd-a-year-after-oil-pipeline-protests>.

² Delilah Friedler, *Before Standing Rock, There Was Alcatraz*, DISSENT MAG. (Jan. 24, 2018), <http://www.dissentmagazine.org/blog/before-standing-rock-alcatraz-occupation>.

³ Gunderson, *supra* note 1.

⁴ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 119–20 (D.D.C. 2017).

⁵ *Id.* at 134, 140.

⁶ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 282 F. Supp. 3d 91, 108–09 (D.D.C. 2017).

⁷ Leila Fadel, *Record Number of Native Americans Running for Office in Midterms*, NPR (July 24, 2018, 7:30 AM), <http://www.npr.org/2018/07/04/625425037/record-number-of-native-americans-running-for-office-in-midterms>; Simon Romero, *Native Americans Score Historic Wins in Midterms After Years of Efforts*, N.Y. TIMES (Nov. 7, 2018), <http://www.nytimes.com/2018/11/07/us/elections/native-americans-congress-haaland-davids.html>.

the first two Native American women, Deb Haaland and Sharice Davids, to the House of Representatives, doubling the number of Native people there;⁸ selected Ojibwe Peggy Flanagan as Lieutenant Governor of Minnesota;⁹ and won local seats long dominated by anti-Indian politicians. The electoral success was despite—and perhaps because of—determined efforts to depress the Native vote in areas affected by environmental battles. After the DAPL fight, for example, North Dakota passed a law requiring voter identification cards to include street addresses, disparately targeting reservations, where mail is generally delivered to post offices and street addresses are hard to prove.¹⁰ In response, tribal governments organized a historic voter registration and get out the vote effort, nearly doubling Native turnout and helping Ruth Buffalo—a member of the Mandan, Hidatsa, and Arikara Nations—win her election to replace the Republican sponsor of the law.¹¹ On a smaller scale, in Utah’s San Juan County, election officials illegally removed Navajo candidate Willie Grayeyes from the ballot in an election for seats on the County Commission.¹² Greyeyes is an activist who supports the Bears Ears National Monument, which is sacred to Navajos and other tribes in the area, while the three-member commission had long opposed the monument and supported President Trump’s order shrinking it to facilitate oil extraction.¹³ A federal judge ordered Greyeyes’s name be restored to the ballot, and he and Kenneth Maryboy—another Navajo Bears Ears advocate—won two seats on the three-member commission, effectively reversing its position on Bears Ears.¹⁴

Although Bears Ears was a key issue in the Utah election, few of the 2018 candidates focused on Native issues, and their candidacies benefited from the general support for Democratic candidates, particularly women.¹⁵ But it is hard to imagine that the mobilization and public attention created

⁸ Romero, *supra* note 7.

⁹ Vincent Schilling, *Herstory! Deb Haaland, Sharice Davids in Congress and Peggy Flanagan as Lt. Gov.*, INDIAN COUNTRY TODAY (Nov. 7, 2018), http://newsmaven.io/indiancountrytoday/news/herstory-deb-haaland-sharice-davids-in-congress-and-peggy-flanagan-as-lt-gov-uq-pHFLPL0Sp_9eimci2jA/.

¹⁰ See *Brakebill v. Jaeger*, 905 F.3d 553, 555–56 (8th Cir. 2018) (explaining the North Dakota election identification statute, N.D. CENT. CODE ANN. § 16.1-01-04.1 (2018)); see *id.* at 558–59 (discussing the parties’ arguments regarding whether the requirement “posed a legal obstacle to the right to vote for Native Americans . . .”).

¹¹ Maggie Astor, *Meet the Native American Woman Who Beat the Sponsor of North Dakota’s ID Law*, N.Y. TIMES (Nov. 13, 2018), <http://www.nytimes.com/2018/11/13/us/politics/north-dakota-ruth-buffalo.html>.

¹² Krista Allen, *Grayeyes Wins County Seat in Historic Election*, NAVAJO TIMES (Nov. 8, 2018), <http://www.navajotimes.com/reznews/grayeyes-wins-county-seat-in-historic-election/>.

¹³ *Id.*; Nate Carlisle, *Split Appears in San Juan as New Navajo-led County Commission Moves to Support an Even Bigger Bears Ears than Trump Shrunk*, SALT LAKE TRIB. (Feb. 21, 2019), <http://www.sltrib.com/news/politics/2019/02/21/split-appears-san-juan/>.

¹⁴ Allen, *supra* note 12.

¹⁵ See Romero, *supra* note 7 (discussing the campaigns and backgrounds of various Native American candidates who were elected to office in the 2018 midterm elections).

by DAPL and Bears Ears did not also play a role. Indeed, this Essay argues, environmental issues have played a key role in shaping Native activism and political and legal success throughout the modern era of Federal Indian law. While land struggles have always been core to tribal-settler conflicts,¹⁶ this Essay focuses not on land itself, but on the right to control the environmental conditions and natural resources of the land. These are distinctive, and distinctively galvanizing, because of their connection to tribal cultures and lifeways. These struggles were focal points for collective action that helped maintain and revitalize tribal identity in the face of settler efforts to destroy it. Because they tapped into non-Native stereotypes about indigenous connections to nature (for better and worse), they also often won broad non-Indian support. Judicial and legislative victories in these struggles, in turn, created principles that supported diverse tribal campaigns for sovereignty and land rights.

Several caveats are in order. First, many factors other than natural resources went into the making of modern Federal Indian law. The continued existence of tribal nations and their recognition in law reflects the persistent refusal of tribal peoples to relinquish sovereignty across many arenas, not just natural resources.¹⁷ As a matter of doctrine, moreover, decisions regarding commercial and criminal jurisdiction have played a far larger role in shaping Federal Indian law.¹⁸ Further, the tendency of non-Natives to understand tribal peoples solely as natural stewards of the earth leads to backlash against tribes trying to act as modern, evolving peoples.¹⁹

With those caveats in place, this Essay proceeds with four largely chronological examples. Part I looks to the turn of the twentieth century, when federal allotment policies and the judicial plenary power doctrine threatened to destroy tribal sovereignty altogether. In this period, decisions about tribal rights to natural resources and federal rights to protect them against states were key to preserving pro-tribal elements of an earlier era. Part II turns to the Pueblo efforts to maintain traditional control over water resources and the ways these efforts created a movement that would soon transform Federal Indian policy. Part III moves to the disputes over fishing rights in Washington State, which kick-started the pan-Indian activism of the 1960s and 1970s, directly contributed to formalized recognition

¹⁶ See, e.g., STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* 6 (1988) (describing the “Indian problem” as primarily “how best to secure access to Indian resources, land in particular”).

¹⁷ See *id.* at 7–8 (describing refusal of tribal peoples to sacrifice tribal survival).

¹⁸ See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202–03 (1987) (regarding criminal jurisdiction over gambling); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (regarding criminal jurisdiction over non-Indians); *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164 (1973) (regarding jurisdiction over tax matters); *Williams v. Lee*, 358 U.S. 217 (1959) (regarding jurisdiction over contract dispute).

¹⁹ See, e.g., Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1050–51 (2005) (describing the tendency of the Supreme Court to deny tribes jurisdiction when they are acting as modern sovereigns, rather than engaging in practices perceived as “traditionally ‘Indian’”).

procedures for Federal Indian tribes, and indirectly contributed to the initiation of the self-determination policy that still prevails in the federal government. Part IV turns to international law, as disputes over natural resources played an outsized role in today's recognition of indigenous human rights to self-determination. The Essay concludes with the connections between these historical conflicts and the modern campaigns by tribal nations in the U.S. and indigenous peoples across the world.

I. YAKIMA FISHING RIGHTS: PRESERVING TRIBAL RIGHTS IN THE ASSIMILATION ERA

The turn of the twentieth century was a low point for tribal nations. With tribal military might largely contained and U.S. settlers having spread across the United States, federal policy turned to forcible assimilation of Native people and division of their remaining lands. Tribal territories were circumscribed, reservations divided among individual Indians and settlers, Indian children sent to boarding schools, and federal agents worked to quash tribal religion and culture. To accommodate these shifts, the United States Supreme Court created several new doctrines: first, Congress had “plenary authority” in Indian affairs unrestricted by treaty rights, the Constitution, or even the judicial power;²⁰ second, the federal-tribal relationship derived from tribal “weakness and helplessness” rather than sovereignty;²¹ and finally, state authority extended onto reservations and could preempt even federal treaty rights.²²

In this period of general retreat from tribal sovereignty, some of the few pro-tribal developments concerned tribal authority over natural resources. Most notable is the 1905 decision in *United States v. Winans*, which considered the Yakima treaty right to fish “at all usual and accustomed places in common with the citizens of the Territory.”²³ The defendants owned the riverfront lands by one of those “usual and accustomed places,” and claimed they could exclude Indians trying to fish there.²⁴ Even worse, they had installed a state-licensed fish wheel in the river, effectively scooping up the entire available catch and preventing any other fishing

²⁰ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *United States v. Kagama*, 118 U.S. 375, 380 (1886).

²¹ *Kagama*, 118 U.S. at 384.

²² *Utah & N. Ry. v. Fisher*, 116 U.S. 28, 31 (1886) (“The authority of the Territory may rightfully extend to all matters not interfering with [benefits to the Indians.]”); see also *Draper v. United States*, 164 U.S. 240, 245 (1896) (holding that by admitting Montana as a state without specifically reserving jurisdiction over non-Indians there, the United States gave up to the state authority to prosecute crimes between non-Indians); *Ward v. Race Horse*, 163 U.S. 504 (1896), held repudiated by *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (holding that tribe’s off-reservation hunting rights ended upon admission of Wyoming on equal footing with other states).

²³ 198 U.S. 371, 378 (1905).

²⁴ *Id.*

there.²⁵ The United States filed a case to enforce the treaty rights in 1895, but the case lagged on for years, despite testimony from tribal members and non-Indians about the threat that blocking access to the fish posed to Yakima lives and culture.²⁶ Finally, in 1903, the lower court dismissed the complaint, holding that treaty rights must give way to the defendants' property rights:

The Indians are at the present time on an equal footing with the citizens of the United States who have not acquired exclusive proprietary rights, and this it seems to me is all that they can legally demand with respect to fishing privileges in waters outside the limits of Indian reservations under the terms of their treaty with the United States.²⁷

The years between filing and dismissal gave the court ample support for its opinion. In 1896, the Supreme Court decided *Ward v. Race Horse*, holding that the treaty right of the Shoshone-Bannock to hunt off-reservation “upon the unoccupied lands of the United States so long as game may be found thereon” did not survive Wyoming statehood.²⁸ It was irrelevant that Race Horse was, indeed, hunting on federal unoccupied lands, far from any settlement.²⁹ Simply admitting Wyoming as a state “on equal footing” with the other states of the union, without expressly reserving the treaty right, abrogated that right.³⁰ The same year, the Court held that admission as a state abrogated federal jurisdiction over crimes between non-Indians on reservations,³¹ and in 1903 held that Congress had plenary power to abrogate tribal treaty rights.³² By the time *Winans* went before the Court, tribal treaty rights seemed a slim reed to withstand state authority.

Nevertheless, the Supreme Court reversed.³³ In passionate language, the Court declared “[t]he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians . . . which were not much less necessary to the existence of the Indians than the atmosphere they breathed.”³⁴ Drawing on older cases, the Court forcefully held that the treaty must be construed as the Indians would have “understood it.”³⁵ If the treaty guaranteed the Yakima “no rights but what any inhabitant of the territory or

²⁵ *Id.* at 380.

²⁶ Michael C. Blumm & James Brunberg, “Not Much Less Necessary . . . Than the Atmosphere They Breathed”: Salmon, Indian Treaties, and the Supreme Court—A Centennial Remembrance of *United States v. Winans and Its Enduring Significance*, 46 NAT. RESOURCES J. 1, 35–40 (2006).

²⁷ Transcript of Record at 73–74, *United States v. Winans*, 198 U.S. 371 (1903) (No. 122).

²⁸ *Ward v. Race Horse*, 163 U.S. 504, 504 (1896), held repudiated in *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019).

²⁹ *Id.* at 507.

³⁰ *Id.* at 513.

³¹ *Draper v. United States*, 164 U.S. 240, 245 (1896).

³² *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

³³ *Winans*, 198 U.S. at 381.

³⁴ *Id.*

³⁵ *Id.* at 380–81 (quoting *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886)).

state would have,” this would “certainly [be] an impotent outcome to negotiations and a convention which seemed to promise more, and give the word of the [n]ation for more.”³⁶

Even more important was *Winans*’ holding regarding the meaning of treaties generally. The lower court had applied the rule of “[e]xpressio unius est exclusio alterius” in finding that by expressly including fishing rights in common with the citizens of the territory, the treaty excluded any additional rights.³⁷ The Supreme Court adopted the opposite rule: tribes retained all pre-existing rights not expressly given away.³⁸ Before the treaty, “upon the exercise of [fishing rights] there was not a shadow of impediment.”³⁹ In the treaty, “[o]nly a limitation [of those rights] was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.”⁴⁰

When federal Indian policy shifted back toward tribal self-determination in the 1930s,⁴¹ this principle was key to the U.S. Solicitor’s declaration that “those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.”⁴² Although the federal government could limit these inherent powers, “[w]hat [wa]s not expressly limited remain[ed] within the domain of tribal sovereignty.”⁴³ The Solicitor’s Opinion cited *Worcester v. Georgia*—a century-old case from a different time in federal policy—as the “earliest complete expression of these principles,”⁴⁴ but *Winans* far more explicitly expressed the rule.⁴⁵

Equally important, *Winans* rejected the emerging rule that statehood limited tribal treaty rights and federal power in Indian affairs. The Court held that allowing tribal rights to survive statehood was “surely within the competency of the Nation.”⁴⁶ The equal footing doctrine cast no impediment

³⁶ *Id.* at 380.

³⁷ *United States v. Winans*, 73 F. 72, 74 (C.C.D. Wash. S.D. 1896).

³⁸ *See Winans*, 198 U.S. at 371, 381 (explaining that the treaty did not grant rights to the Indians, but preserved those rights already possessed and not expressly surrendered).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *See* Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 787 (2006) (discussing the beginning of the “self-determination era”).

⁴² Powers of Indian Tribes, 55 Interior Dec. 14, 19 (Oct. 25, 1934).

⁴³ *Id.*

⁴⁴ *Id.* at 448.

⁴⁵ *See* Blumm & Brunberg, *supra* note 26, at 48–49 (crediting *Winans* for creating the reserved rights doctrine of treaty interpretation); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 402 (1993) (noting that although the reserved rights doctrine was rooted in a “subtle Marshallian move” in *Worcester*, *Winans* was the first case in which the Court “squarely embraced it”).

⁴⁶ *United States v. Winans*, 198 U.S. 371, 384 (1905).

on this power.⁴⁷

Although *Winans* quickly contributed to the 1908 decision in *Winters v. United States* that reservations included adequate water to irrigate them, and that state water law could not undermine such water rights,⁴⁸ it did nothing to undermine the doctrine of federal plenary power or policies seeking to destroy tribes. It also did not prevent states from violating the *Winans* principles—it took decades of litigation for states to stop arresting tribal citizens for exercising treaty fishing rights.⁴⁹ But *Winans* did preserve and expand the principles of tribal reserved sovereignty, treaty interpretation, and federal preemption that modern Federal Indian law depends on.⁵⁰ And, as seen in Section III, the struggle to vindicate fishing rights preserved in *Winans* would catalyze a new era of tribal collective action.⁵¹

II. PUEBLO WATER AND THE MAKING OF FEDERAL INDIAN POLICY: INSPIRING THE NEW DEAL AND CEMENTING SELF-DETERMINATION

The struggle of the Pueblo peoples of New Mexico to control their traditional water sources had small impact on case law, but vast impact on executive and legislative policy. It brought John Collier, lead architect of the Indian New Deal, to the cause of Native people; led to the influential Meriam Report critiquing the assimilation policy; and was the first significant move by President Nixon, architect of the Self-Determination Policy, in Indian affairs.

Pueblo peoples have lived in the Rio Grande watershed for over a thousand years, building the oldest continually inhabited structures in the United States on its arid landscape.⁵² As agricultural peoples, they developed sophisticated irrigation systems to grow corn, squash, and beans in an area

⁴⁷ *Id.* at 383.

⁴⁸ *Winters v. United States*, 207 U.S. 564, 564 (1908).

⁴⁹ See Phuong Lee, *Bill Would Clear Native Americans of Fish Wars Convictions*, SEATTLE TIMES (Jan. 14, 2014, 9:15 PM), <https://www.seattletimes.com/seattle-news/bill-would-clear-native-americans-of-fish-wars-convictions/> (“Tribal members and others were roughed up, harassed and arrested while asserting their right to fish for salmon off-reservation under treaties signed with the federal government more than a century prior. The Northwest fish-ins . . . were part of larger demonstrations to assert American Indian rights nationwide. The fishing acts, however, violated state regulations at the time and prompted raids by police and state game wardens and clashes between Indian activists and police.”).

⁵⁰ See *Winans*, 198 U.S. at 384 (“[S]urely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as ‘taking fish at all usual and accustomed places.’”).

⁵¹ See *infra* Section III (“Despite the victory in *United States v. Winans*, Washington and other states had never stopped trying to impose state fishing restrictions on tribal fishers. The struggle against this opposition was the catalyst for newly unified and militant Indian activism starting in the 1960s, paving the way to the occupation of Alcatraz and Wounded Knee.” (footnote omitted)).

⁵² See *About Taos Pueblo*, TAOS PUEBLO, <http://taospueblo.com/about/> (last visited Feb. 12, 2019) (“Ancient ruins in the Taos Valley indicate our people lived here nearly 1000 years ago They are considered to be the oldest continually inhabited communities in the USA.”).

of low rainfall.⁵³ This culture survived hundreds of years of colonization by Spain, Mexico, and the United States.⁵⁴ With the twentieth century, however, came a new existential threat. In 1906, Theodore Roosevelt included Taos Pueblo's sacred Blue Lake in Carson National Forest.⁵⁵ Then, in 1921, Senator Holm Bursum of New Mexico proposed a bill that would quiet title in the non-Indians on Pueblo lands.⁵⁶ If ratified, the non-Indian claims would include only about ten percent of the Pueblos' remaining acreage, but would monopolize almost all of their water rights.⁵⁷ Even worse, the bill provided that all water rights disputes were subject to New Mexico's jurisdiction—meaning that state prior appropriation doctrine would wipe away the protections of *United States v. Winters*.⁵⁸

But the Pueblos had influential friends, and their influence, together with coordinated Pueblo resistance, would soon create a new era in Federal Indian policy. Mabel Dodge Sterne, founder of a salon in Greenwich Village, had moved to Taos in 1917 and fallen in love with and married Taos Pueblo politician Tony Lujan.⁵⁹ She invited the avant garde artists and progressives from her salon—including sociologist John Collier—to Taos to meet with the Pueblo people, and when the Bursum Bill was proposed, she mobilized them against it.⁶⁰ These influential activists wrote articles that appeared in publications from the *New York Times* to the *Christian Science Monitor* about the plight of the Pueblos.⁶¹ Equally important, the General Federation of Women's Clubs of America, with its two million members, rallied against the bill, inspiring women from across the country to send letters and telegrams to Congress.⁶² John Collier threw himself into this fight, writing a series of articles in *Sunset Magazine* and serving as “research agent” for the

⁵³ See Rebecca Simon, *Preparing for the Future While Studying the Past: Ancestral Pueblo Farming*, PROJECT ARCHAEOLOGY, <https://projectarchaeology.org/2015/11/20/preparing-for-the-future-while-studying-the-past-ancestral-pueblo-farming/> (last visited Feb. 12, 2019) (describing irrigation techniques and typical crops grown by the Pueblo).

⁵⁴ See *Becoming Part of the United States*, LIBR. CONG., <https://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/alt/mexican2.html> (last visited Feb. 12, 2019) (“Mexicans first arrived in present-day New Mexico in 1598 and founded the city of *Santa Fe* in 1610. By 1800, Spain had governed Mexico as a colony for almost 300 years [In 1846, the Treaty of Guadalupe Hidalgo] gave [the U.S.] an enormous amount of land, including . . . parts of Colorado, Arizona, New Mexico, Utah and Nevada”).

⁵⁵ R.C. Gordon-McCutchan, *The Battle for Blue Lake: A Struggle for Indian Religious Rights*, 33 J. CHURCH & ST. 785, 786 (1991).

⁵⁶ DONALD L. FIXICO, *THE INVASION OF INDIAN COUNTRY IN THE TWENTIETH CENTURY: AMERICAN CAPITALISM AND TRIBAL NATURAL RESOURCES* 64 (2d ed. 2012).

⁵⁷ *Id.* at 63.

⁵⁸ *Id.* at 66.

⁵⁹ Kenneth Philp, *Albert B. Fall and the Protest from the Pueblos, 1921-23*, 12 ARIZ. & W. 237, 243, 248 (1970).

⁶⁰ *Id.* at 243–44.

⁶¹ *Id.* at 243–45.

⁶² *Id.* at 245–47.

Federation of Women's Clubs.⁶³ Collier and Tony Lujan also visited the different Pueblo tribes to inform them of the bill, leading them to call an All Pueblo Meeting.⁶⁴

Pueblo leaders had already been protesting against the settlers fencing off their lands, and in response to the Bursum Bill they reinvigorated the All Indian Pueblo Council (AIPC), drafted an appeal to Congress, and raised \$3,500 to send a delegation of Pueblo village governors east to raise awareness and address Congress directly.⁶⁵ Speaking before thousands, they gained funds for the fight and valuable experience in translating their concerns to a national stage.⁶⁶ After the Bursum Bill was defeated and replaced with a more favorable Pueblo Lands Act,⁶⁷ the AIPC would use this experience to unite against efforts to ban their religious dances, and ensure that new water conservation and irrigation efforts on the Rio Grande would address their rights and needs.⁶⁸

The mobilization of the fight against the Bursum Bill also contributed directly to the Indian New Deal. John Collier had been transformed by his encounter with Taos Pueblo, romanticizing it as embodying a "Red Atlantis" with valuable lessons for modern, atomized society.⁶⁹ By 1922, he was proposing a new policy against forcible assimilation and for expanding tribal self-governance.⁷⁰ The Bursum Bill fight inspired many besides Collier, triggering what a critical early historian called, "an orgy of muckraking" on federal treatment of tribes in the 1920s.⁷¹ In 1926, responding to political pressure and Collier's urging, Secretary of the Interior Hubert Work commissioned a study on Federal Indian administration from the recently-created Institute for Government Research, or Brookings Institute.⁷² In 1928, *The Problem of Indian Administration*, better known as the "Meriam Report," was published.⁷³ A scathing indictment, the report encouraged improvement of health and education services to the Indians, although with little rethinking of the basic premises of federal policy.⁷⁴ But when Franklin Delano Roosevelt assumed the presidency in 1933, he appointed John

⁶³ *Id.* at 246–48.

⁶⁴ *Id.* at 248.

⁶⁵ Robin S. Walden, *The Pueblo Confederation's Political Wing: The All Indian Pueblo Council, 1920–1975* at 27–29 (July 1, 2011) (unpublished M.A. thesis, University of New Mexico) (on file with the University of New Mexico Digital Repository at http://digitalrepository.unm.edu/hist_etds/79).

⁶⁶ *Id.* at 37.

⁶⁷ Pueblo Lands Act, Pub. L. No. 68-253, 43 Stat. 636 (1924).

⁶⁸ Walden, *supra* note 65, at 37–38, 55–58; Philp at 248.

⁶⁹ John Collier, *The Red Atlantis*, XLIX THE SURVEY 15 (1922).

⁷⁰ *Id.* at 19–20.

⁷¹ Randolph C. Downes, *A Crusade for Indian Reform, 1922–1934*, 32 MISS. VALLEY HIST. REV. 331, 337 (1945).

⁷² *Id.* at 340–41.

⁷³ STUDIES IN ADMINISTRATION, INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., 1928).

⁷⁴ Downes, *supra* note 71, at 345–48.

Collier as his Commissioner on Indian Affairs.⁷⁵ The Indian New Deal—the first U.S. Indian policy in centuries to actively encourage tribal self-government—was the result.⁷⁶

The Indian New Deal and Collier have been criticized for forcing a particular form of tribal self-government on Indian people,⁷⁷ and after World War II, it was replaced by renewed push for tribal assimilation and termination.⁷⁸ By the time Richard Nixon assumed the presidency in 1969, however, tribal resistance created a new atmosphere in Washington. And when President Nixon first turned to Indian policy, it was another battle over Pueblo traditional water sources that symbolized his newly announced Self-Determination Policy.⁷⁹

The Taos Pueblo had never stopped fighting to regain exclusive use of Blue Lake. Blue Lake is a shrine to the Taos Pueblo, the location of religious rituals that must be performed without outside observation or interference.⁸⁰ The United States, however, not only opened the area to public hunting, fishing, and recreation, it also built a U.S. Forest Service cabin and horse corral there in 1928 to symbolize its control of the watershed.⁸¹ For decades, the government resisted the quest of Collier, Oliver LaFarge, and Taos Pueblo officials Seferino Martinez and Paul Bernal for return of Blue Lake.⁸² In 1965, the U.S. Indian Claims Commission ruled that taking the land violated Taos Pueblo property rights, entitling them to compensation, but the Taos Pueblo did not want money—they wanted their sacred lake.⁸³ Although the House of Representatives approved a bill for return of the land in 1968, Senator Clinton Anderson of New Mexico prevented it from moving further.⁸⁴

Again, the Pueblo people inspired a national campaign for their cause. Hundreds of editorials, sympathetic documentaries, and the influential National Council of Churches advocated to restore the lake and preserve Taos religious practice.⁸⁵ After meeting with Pueblo elders, Reverend Dean Kelley, the National Council of Churches director of the Commission on

⁷⁵ FRANCIS P. PRUCHA, *THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 918 (1984).

⁷⁶ 1-22 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 22.01 (Nell J. Newton ed., 2012), LexisNexis (database updated 2017).

⁷⁷ E.g., Charles F. Wilkinson, *Home Dance, the Hopi, and Black Mesa Coal: Conquest and Endurance in the American Southwest*, 1996 BYU L. REV. 449, 458 (1996) (describing clash with Hopi traditional forms of governance).

⁷⁸ Bethany R. Berger, *Williams v. Lee and the Debate over Indian Equality*, 109 MICH. L. REV. 1463, 1472-74 (2011).

⁷⁹ *Id.* at 1519-20.

⁸⁰ Gordon-McCutchan, *supra* note 55, at 786.

⁸¹ *Id.* at 786-87.

⁸² *Id.* at 787.

⁸³ *Id.* at 788.

⁸⁴ *Id.* at 789.

⁸⁵ *Id.*

Religious Liberties, was able to understand and articulate that sacredness was found not in the lake as an isolated location, but in the watershed ecosystem as a whole.⁸⁶

Anything which mutilates the valley hurts the tribe. If the trees are cut, the tribe bleeds. If the springs or lakes or streams are polluted, the lifestream of the tribe is infected The aura of sanctity, which has its source in the water-course where the Creators' life-sustaining water flows out to the inhabitants of semi-arid land, is indivisible from the related lands and the living things they produce.⁸⁷

Testifying before the House Committee on Indian Affairs in 1969, Taos Council Secretary Paul Bernal more explicitly presented the Taos philosophy as an alternative to an increasingly criticized view of the environment:

In all of its programs the Forest Service proclaims the supremacy of man over nature; we find this viewpoint contrary to the realities of the natural world and to the nature of conservation. Our tradition and our religion require our people to adapt their lives and activities to our natural surroundings so that men and nature mutually support the life common to both.⁸⁸

This message, of course, found a receptive audience in a newly environmentally aware nation.⁸⁹

The Blue Lake issue came to a White House ready for a new Indian policy. Spurred by tribal activism and a new awareness of minority rights, President Lyndon Johnson had already proclaimed an end to termination in favor of self-determination,⁹⁰ but had proposed little major legislation. It was left to President Nixon to transform self-determination from aspiration to coordinated policy. Advisors and advocates presented the return of Blue Lake to Nixon as the fitting first symbol of that policy, and a necessary means to convince tribal people that the administration was serious.⁹¹ On

⁸⁶ *Id.* at 790.

⁸⁷ Gordon-McCutchan, *supra* note 55, at 790.

⁸⁸ *Id.* at 792.

⁸⁹ *See id.* at 791, 793 (“The social climate of opinion also became progressively more favorable. The Indians’ quest for religious freedom to protect their culture and their sacred land resonated with some important themes of the late 1960s—cultural pluralism, minority rights, and the back-to-nature movement.”).

⁹⁰ Lyndon B. Johnson, Special Message to the Congress on the Problems of the American Indian: “The Forgotten American,” (March 6, 1968) (transcript available online from The American Presidency Project) (“I propose, in short, a policy of maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination.”).

⁹¹ *See* Gordon-McCutchan, *supra* note 55, at 793 (describing Nixon’s connection to his Indian college football coach, “Chief” Wallace Newman, which led Nixon to prioritize helping the Indian people

July 8, 1970, the President announced a comprehensive new Self-Determination Policy surrounded by Taos Pueblo elders.⁹² As part of the announcement, the President declared that the return of the Blue Lake watershed “is an issue of critical and unique importance to Indians throughout the country,” and used this opportunity “wholeheartedly to endorse” legislation to return its 48,000 acres to the Taos Pueblo.⁹³ Although Senator Anderson and others maintained their opposition, Vice President Spiro Agnew and Arizona Senator Barry Goldwater threw their support behind the bill first championed by liberals Robert Kennedy and George McGovern.⁹⁴ The measure passed the Senate in December 1970.⁹⁵

The Pueblo fight to maintain traditional water sources initiated both the movement toward tribal self-government with the Indian New Deal and its fuller expression in the present-day Self-Determination Policy. It catalyzed coordinated Indian advocacy and drew diverse non-Native constituencies—artists, women’s clubs, and church groups, liberal Democrats and libertarian Republicans—to the cause of tribal self-determination. Although rarely acknowledged by legal scholars, this natural resources struggle profoundly shaped the Federal Indian law and policy of today.

III. TREATY FISHING RIGHTS REDUX: COLLECTIVE ACTIVISM AND TRIBAL RESURGENCE

While the return of Blue Lake was the symbolic beginning of the Self-Determination Policy, the renewed struggle over off-reservation treaty fishing paved its way. Despite the victory in *United States v. Winans*, Washington and other states had never stopped trying to impose state fishing restrictions on tribal fishers. The struggle against this opposition catalyzed a newly unified and militant Indian activism starting in the 1960s.⁹⁶ The fishing rights battle helped kickstart the formal study of Federal Indian law in law schools, and contributed to the passage of regulations for acknowledgement of unrecognized Indian tribes. The struggle resulted in important legal victories, and had an incalculable impact on the modern resurgence of tribal sovereignty.

The renewed fishing rights battle began as a deliberate protest against the Termination Policy. In 1954, after Congress passed Public Law 280—

during his administration); see William Deverell, *The Return of Blue Lake to the Taos Pueblo*, 49 PRINCETON LIBR. CHRON. 57, 67–68 (1987) (“[Nixon’s presidential assistant] Garment informed the President that the Blue Lake case had ‘snowballed and is now the single specific Indian issue and as such is of major symbolic importance.’”).

⁹² Gordon-McCutchan, *supra* note 55, at 794.

⁹³ Richard M. Nixon, Special Message to the Congress on Indian Affairs (July 8, 1970) (transcript available online from The American Presidency Project).

⁹⁴ Gordon-McCutchan, *supra* note 55, at 794.

⁹⁵ *Id.*

⁹⁶ CORNELL, *supra* note 16, at 5.

which permitted states to acquire jurisdiction over Indians on their reservations—a Puyallup man, Robert Satiacum, deliberately went fishing out of season with a gill net on the Puyallup reservation.⁹⁷ Although the Washington Supreme Court held the charges must be dismissed, four of the eight justices believed Washington could impose its restrictions to achieve fish conservation.⁹⁸

The State did not try to prove the regulations were necessary for conservation in *State v. Satiacum*, but soon began to.⁹⁹ Even though Indians took only 6.5% of the salmon catch, while sport fishers took 12.2% and commercial fishing operations took 81.3%, Washington and fishing lobbyists insisted that tribal fishing was the greatest threat to fish conservation.¹⁰⁰ State wardens repeatedly raided tribal fish camps in the 1960s, arresting tribal fishers and confiscating their equipment and boats.¹⁰¹ In 1963, the Washington Supreme Court upheld the State's actions, holding that the equal footing doctrine entitled it to completely prohibit fishing at usual and accustomed places for conservation purposes.¹⁰² Native people from tribes across Washington continued to fish in protest and the State continued to arrest them.¹⁰³

In 1964, the resisters met with the National Indian Youth Coalition (NIYC), a new organization of students from many tribes founded with a mission to use the activist tactics of the civil rights movement for Native causes.¹⁰⁴ The NIYC leadership saw the fishing protests as “a great battle to preserve aboriginally-derived” rights, and an opportunity to show the world Native people “had [the] guts to take direct action.”¹⁰⁵ NIYC sent telegrams calling its members to join them at “fish-ins” to protest State enforcement.¹⁰⁶ They also contacted Marlon Brando, who had attended an NIYC meeting, and he joined them at the river banks as well.¹⁰⁷ Altogether, protesters from forty-seven tribes were represented at the 1964 fish-ins,¹⁰⁸ inaugurating a new era of unified Indian activism that paved the way for the self-determination policy of the 1970s.¹⁰⁹

⁹⁷ Bradley G. Shreve, “From Time Immemorial”: *The Fish-in Movement and the Rise of Intertribal Activism*, 78 PAC. HIST. REV. 403, 411 (2009).

⁹⁸ *State v. Satiacum*, 314 P.2d 400, 400–06, 410 (Wash. 1959).

⁹⁹ Shreve, *supra* note 97, at 412.

¹⁰⁰ *Id.* at 412, 427.

¹⁰¹ *Id.* at 413–14.

¹⁰² *State v. McCoy*, 387 P.2d 942, 952 (Wash. 1963).

¹⁰³ Shreve, *supra* note 97, at 415.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 416–17.

¹⁰⁶ *Id.* at 417–18.

¹⁰⁷ *Id.* at 418.

¹⁰⁸ *Id.* at 424.

¹⁰⁹ See CORNELL, *supra* note 16, at 4–5 (describing NIYC as “pioneering practitioners of a genuinely new and genuinely Indian politics” who “forc[ed] the surrounding society to respond once again to their actions and agendas”).

The legal battle that followed was long. In 1970, the United States finally sued to enforce tribal fishing rights.¹¹⁰ In 1974, U.S. District Judge Boldt held that the State had not made the case for enforcing its conservation measures against the tribe, that tribes could and had enforced their own conservation measures, and—most significantly—that treaty fishers were entitled to take up to half of the harvestable fish at their usual and accustomed fishing places.¹¹¹ The State and the public reacted with fury. Sport-fishers reacted by hanging Judge Boldt in effigy.¹¹² “Can an Indian, Save a Salmon,” was a popular off-reservation bumper sticker.¹¹³ As the Supreme Court would later declare, Washington State undertook “extraordinary machinations in resisting the [1974] decree Except for some desegregation cases . . . , the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century.”¹¹⁴ The Court largely affirmed the district court decree, and the federal power to enforce it.¹¹⁵ The tribes had fought the State and won, thereby igniting a new activist movement in the process.

This battle also led to a rebirth of tribes in the state. While at least twenty-two tribes signed the 1855 treaty with the United States, the treaty created only two reservations, far from most of the tribes’ lands.¹¹⁶ Most tribes chose to remain on their aboriginal lands, even though they had little federal protection or support there.¹¹⁷ In defending against treaty fishing claims, the State argued that those tribes no longer existed, so their claimed members could not enforce their treaty rights.¹¹⁸ Many of these tribes were able to reassert their tribal identity and petition for federal recognition as part of the litigation process.¹¹⁹ But the impact of their struggles to establish their tribal status went far beyond Washington. The plight of the unrecognized Washington tribes figured in the 1977 American Indian Policy Review Commission,¹²⁰ leading to the creation of a formalized federal acknowledgement process in 1978.¹²¹ While this process is far from perfect,

¹¹⁰ *United States v. Washington*, 384 F. Supp. 312, 327–28 (W.D. Wash. 1974).

¹¹¹ *Id.* at 341–43.

¹¹² Shreve, *supra* note 97, at 433.

¹¹³ Bruce Barcott & Stephen Baxter, *What's a River for?*, MOTHER JONES, May 1, 2003, at 44.

¹¹⁴ *Washington v. Wash. Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 n.36 (1979) (quoting *Puget Sound Gillnetters Ass'n v. U.S. Dist. Court for W. Dist. of Wash.*, 573 F.2d 1123, 1126 (9th Cir. 1978)).

¹¹⁵ *Id.* at 696.

¹¹⁶ Treaty with the Dwamish, Suquamish etc. art. 3, Jan. 22, 1855, 12 Stat. 927.

¹¹⁷ See *United States v. Washington*, 384 F. Supp. 312, 379 (W.D. Wash. 1974) (noting that some of the Skagit Tribe moved to the reservation set up by a treaty, “but the majority remained in their aboriginal area”).

¹¹⁸ *Id.* at 339.

¹¹⁹ *Id.* at 400.

¹²⁰ TASK FORCE TEN, AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT TO THE AMERICAN INDIAN POLICY REVIEW COMMISSION: REPORT ON TERMINATED AND NON-FEDERALLY RECOGNIZED INDIANS 181–85 (1976).

¹²¹ 25 C.F.R. § 83.11 (2015).

eighteen tribes have now been recognized under this process, and an even larger number have been recognized through federal legislation in the same period.¹²²

The fishing rights struggle even contributed to the study of American Indian Law in law schools. University of Washington students involved in the fishing rights struggle approached Professor Ralph Johnson to beg him to teach a course in the subject.¹²³ He first taught the course as an undergraduate subject in 1967 and began teaching it at the law school two years later.¹²⁴ It was one of the first courses in the country dedicated to the study of the field.¹²⁵

Where *United States v. Winans* preserved the pro-sovereignty doctrines of the past, the fish wars of the 1960s and 1970s were about building the future. The collective activism it generated provided a model for the American Indian Movement occupations of Alcatraz and Wounded Knee a few years later and contributed to a new consensus around tribal self-determination. Assertion of treaty fishing rights for revitalized tribal identities and a new procedure for federal acknowledgement of Indian tribes. They even encouraged the study of American Indian Law as a defined field. These treaty-fishing struggles played a uniquely important role in shaping tribal sovereignty as we know it today.

IV. NATURAL RESOURCES AND THE VINDICATION OF NATIVE RIGHTS AS HUMAN RIGHTS

Struggles over natural resources have played an even larger role in the making of modern international law protecting indigenous peoples. Across the globe, the traditional territories of indigenous peoples encompass 80% of the world's remaining healthy ecosystems and some of its richest natural resources.¹²⁶ Although international environmental activists began with the assumption that these were “virgin forests,” that must remain untouched by human hands, in fact indigenous peoples had used and maintained these resources for generations.¹²⁷ Indigenous campaigns to claim and maintain their traditional resources have played a pivotal role in the modern expansion of indigenous rights in international law.

Even though international law itself can be traced to sixteenth century

¹²² H.R. 3744, *Hearing before the Subcomm. on Indian, Insular, and Alaska Native Aff., Nat. Res. Comm.*, 115th Cong. (Sept. 26, 2017) (written testimony of Kirsten Matoy Carlson).

¹²³ David H. Getches, *Dedication to Professor Ralph W. Johnson*, 72 WASH. L. REV. 995, 1001 (1997).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS. L. REV. 1243, 1255 (2019).

¹²⁷ Armstrong Wiggins, *Indians and the Environment*, 18 YALE ENV. L. J. 345, 345 (1993).

debates on the rights of indigenous peoples,¹²⁸ early twentieth century international law did not recognize indigenous rights. In the 1920s, when Haudenosaunee leader Deskaheh repeatedly tried to bring his claims against Canada before the League of Nations, the League refused to hear his petition.¹²⁹ (Conflicts regarding natural resource use were an important catalyst for petition. Deskaheh noted numerous violations of Haudenosaunee sovereign and treaty rights, but arrests of Iroquois seeking to cut wood for fuel on Iroquois lands without asking federal permission were a particular outrage.)¹³⁰ Early efforts by the United Nations and the International Labor Organization to address indigenous issues treated them as a subset of minority rights, and assumed that full assimilation was the ultimate goal.¹³¹

When indigenous peoples joined together to call for recognition of their rights under international law, however, natural resources issues were front and center. The first World Council of Indigenous Peoples, held in 1975, was the brainchild of George Manuel, a citizen of the Shuswap Nation in Canada.¹³² As a child, he was shaped by watching his grandmother cross fences and defy white people to continue picking berries in her traditional places.¹³³ He believed that a defining characteristic of indigenous peoples--what he called "the Fourth World"--was their relation to the natural resources of the land.¹³⁴ The founding declaration of the World Council of Indigenous Peoples reflected this emphasis on the resources of Mother Earth,¹³⁵ and rights of indigenous peoples to control and make use of natural resources in their territories were prominent in the Council's 1977 Declaration of Human

¹²⁸ See James Brown Scott, Preface to FRANCISCUS DE VICTORIA, DE INDIS ET DE JURE BELLI RELECTIONES 5 (Ernest Nys ed., John Pawley Bate trans., Carnegie Inst. of Wash. 1917) (1557), reprinted in THE CLASSICS OF INTERNATIONAL LAW (James Brown Scott ed., Carnegie Inst. of Wash. 1917).

¹²⁹ See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 57 (2004); *Iroquois Chief Asks League Recognition*, N.Y. TIMES (Dec. 22, 1923), available at <https://www.nytimes.com/1923/12/23/archives/iroquois-chief-asks-league-recognition-deskaheh-of-ontario-says.html> (describing efforts to petition League in Paris); see *Iroquois Tribe Asks Sovereign Status*, N.Y. TIMES (Dec. 23, 1922), available at <https://www.nytimes.com/1922/12/23/archives/iroquois-tribe-asks-sovereign-status-bases-appeal-to-league-of.html>, (describing trip to New York to advance petition).

¹³⁰ *Chief Deskaheh Tells Why He is Over Here Again*, at 5 (1923).

¹³¹ See ANAYA, *supra* note 129, at 58 (discussing International Labour Organization); Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, in HUMAN RIGHTS EXCEPTIONALISM 227–28 (Shareen Hertel & Kathryn Libal, eds. 2011) (discussing UN process).

¹³² Douglas Sanders, *Background Information on the World Council of Indigenous Peoples* (Apr. 1980), available at <https://www.cwis.org/wp-content/uploads/documents/wcinfo.txt>.

¹³³ GEORGE MANUEL & MICHAEL POSLUNS, THE FOURTH WORLD: AN INDIAN REALITY ch.3 (1974).

¹³⁴ *Id.* at ch.1 ("The Fourth World emerges as each people develops customs and practices that wed it to the land as the forest is to the soil.").

¹³⁵ Sanders, *supra* note 132.

Rights.¹³⁶

In 1982, soon after the World Council issued a call for an international convention to protect indigenous rights,¹³⁷ the UN Economic and Social Council established the Working Group on Indigenous Populations to study the matter.¹³⁸ The primary impetus for the group was a study by Juan Martinez Cobo on discrimination against indigenous peoples.¹³⁹ Like the World Council, Cobo emphasized the “damage to indigenous cultures when states and companies destroyed the ‘spiritual relationship’ of indigenous peoples to their lands ‘whenever they wish to exploit the resources of indigenous lands.’”¹⁴⁰ Erica Irene-Daes, chairperson of the Working Group, also emphasized the relationship between self-determination for indigenous peoples and the “continual right to determine their relationship with everything in their world, including landforms, water, animals and plants.”¹⁴¹ She declared that indigenous groups could become wealthy from the sale of forests and minerals but “still lack genuine self-determination if the land and natural resources are no longer under their meaningful control.”¹⁴² The Working Group, with active participation from indigenous peoples from across the world, produced a Draft Declaration on the Rights of Indigenous Peoples by 1993.¹⁴³ But opposition of member states, particularly with respect to its provisions regarding self-determination and natural resources, delayed its adoption by the General Assembly until 2007.¹⁴⁴

While the draft declaration was pending, however, a battle over natural resources by the Awas Tingni community enshrined its principles in international law.¹⁴⁵ The Awas Tingni community of Mayangna Indians

¹³⁶ World Council of Indigenous Peoples, Second General Assembly 3–4 (1977) available at <https://www.cwis.org/wp-content/uploads/documents/premium/280dp00178.pdf>.

¹³⁷ *The Need for International Conventions, A World Council of Indigenous Peoples Concept Paper* (1981), available at <https://www.cwis.org/wp-content/uploads/documents/intconv.txt>.

¹³⁸ Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUMAN RTS. L. REV. 741, 752 (2007).

¹³⁹ UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub.2/1986/7 & Add. 1–4 (“Cobo study”). Although the final conclusion document was published in 1986, interim reports had been published between 1981 and 1983. *Id.* at 1.

¹⁴⁰ *Id.* at 16 ¶¶ 196–201.

¹⁴¹ Dr. Erica-Irene A. Daes, *The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 14 ST. THOMAS L. REV. 259, 265 (2001).

¹⁴² *Id.*

¹⁴³ Errico, *supra* note 138, at 743.

¹⁴⁴ *Id.*; G.A. Res. 61/295 (2007).

¹⁴⁵ Mayangna (Sumo) Awas Tingni v. Nicaragua, Inter-Am. Ct. H.R. (Ser. C), No. 79 (Aug. 31, 2001) [hereinafter *Awas Tingni Judgment*]; JAMES ANAYA & MAIA S. CAMPBELL, GAINING LAND RECOGNITION OF INDIGENOUS LAND RIGHTS: THE STORY OF THE AWAS TINGNI CASE IN NICARAGUA, IN HUMAN RIGHTS ADVOCACY STORIES 117 (Deena Hurwitz & Margaret L. Satterthwaite eds. 2008)

lives in the rainforests of Nicaragua's Atlantic coast, practicing slash and burn agriculture, hunting, and freshwater fishing.¹⁴⁶ In the 1990s, despite provisions in the Nicaraguan constitution protecting indigenous land rights, the government granted two multi-national commissions the right to log the forests within Awas Tingni territory.¹⁴⁷ After efforts to establish land rights and commitments to sustainable logging failed, Awas Tingni brought its claim to the Inter-American Commission, and ultimately the Inter-American Court of Human Rights.¹⁴⁸

Awas Tingni witnesses defined the extent of their territorial rights through their use of natural resources. Witness Jaime Castillo testified that they would go on trips of up to 15 days to hunt and fish, and "return knowing where their surrounding territories are."¹⁴⁹ When asked if they needed to go so far to support themselves, Mr. Castillo answered that "to maintain the territory, even if there is an abundance of animals . . . the Community does not expend its resources, but rather . . . uses a broad expanse of territory but it does not destroy and only recognizes the existence of its surrounding riches." Charly Webster McLean Cornello, who held the position of Person Responsible for the Forest within Awas Tingni, testified that the territory was vital for the "cultural, religious, and family development, and for their very subsistence," that it was a "right of all members of the Community to farm the land, hunt, fish, and gather medicinal plants; however, sale and privatization of those resources are forbidden."¹⁵⁰ In light of the testimony before it, the Court found that "the close ties of indigenous peoples with the land must be recognized and understood as the fundamental basis of their cultures."¹⁵¹

The Court held that the Community had a human right to their lands under an "evolutionary interpretation of instruments for the protection of human rights."¹⁵² It found that Article 21 of the American Convention on Human Rights, which provides that "everyone has a right to use and enjoyment of his property," protects "the rights of members of indigenous communities within the framework of a communal property."¹⁵³ As a result, the Court ordered Nicaragua to demarcate and title the Awas Tingni's traditional lands within fifteen months, and refrain from making any concessions that "might affect the existence, value, or use or enjoyment" of

(noting that the Awas Tingni community did not intend to "forge an international legal precedent with implications for indigenous peoples throughout the world. Yet, that is what they did.").

¹⁴⁶ ANAYA & CAMPBELL *supra* note 145, at 117.

¹⁴⁷ *Id.* at 119–123.

¹⁴⁸ *Id.* at 123, 131.

¹⁴⁹ *Id.* at 138.

¹⁵⁰ *Awas Tingni Judgment*, *supra* note 145, at 19.

¹⁵¹ *Id.* at 75 ¶ 149.

¹⁵² *Id.* at 75 ¶ 148.

¹⁵³ *Id.*

the property “where the members of the Community live and carry out their activities.”¹⁵⁴ It also ordered the state to enact laws enacting administrative procedures for demarcating and titling indigenous lands.¹⁵⁵

Although demarcation took far longer than the Court had ordered,¹⁵⁶ the decision immediately began having an impact. In 2003, Nicaragua set up a comprehensive process for demarcating indigenous lands.¹⁵⁷ The Inter-American Court and Commission expanded on the Awas Tingni decision in “a cascade of cases.”¹⁵⁸ The Inter-American principles became “a point of reference on the international level concerning the elaboration of the minimal content of indigenous peoples’ rights.”¹⁵⁹ Latin American countries also took a “leading role” in the “last phases . . . leading to the adoption” of the UN Declaration of the Rights of Indigenous Peoples in 2007.¹⁶⁰ Adoption of the UN Declaration, in turn, influenced Inter-American human rights, leading to the adoption of the long-pending American Declaration on the Rights of Indigenous Peoples, which incorporates and adds to the UN standards.¹⁶¹

International recognition of indigenous rights as human rights has made huge leaps forward in this century. This is due, in no small part, to the persistent efforts of the remote Awas Tingni Community to defend the natural resources on which their subsistence, culture, and community depend.

CONCLUSION

The resurgence of rights of tribal nations and indigenous peoples is about much more than natural resources. At its heart, their struggles are struggles for self-determination, and this can take many forms. Indeed, any effort to define Native peoples solely by traditional resource use risks denying them self-determination, by denying the right, possessed by all peoples, to evolve in the face of changing circumstances without losing their right to exist.

But natural resource struggles have played a huge role in laying the framework that makes self-determination possible. Because so many Native groups built important elements of their culture and religion around resource

¹⁵⁴ *Id.* at 76 ¶153.

¹⁵⁵ *Id.*

¹⁵⁶ ANAYA & CAMPBELL, *supra* note 145, at 145 (noting the process did not conclude until 2007).

¹⁵⁷ *Id.*

¹⁵⁸ Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 209–11 (2014).

¹⁵⁹ Luis Rodríguez-Pinero, *The Inter-American System and the UN Declaration of Rights of Indigenous Peoples: Mutual Reinforcement*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 257–58 (Stephen Allen & Alexandra Xanthaki eds. 2011).

¹⁶⁰ *Id.* at 458.

¹⁶¹ *Id.* at 480–83.

use, these claims have been uniquely galvanizing. They have catalyzed Native groups to pursue new forms of protest, bring their claims to new legal forums, and build newly unified organizations. These indigenous claims have found unusually sympathetic audiences in judicial and legislative bodies, creating principles and policies that benefit tribal peoples in areas far removed from natural resource use.¹⁶²

This Essay provides just a few examples of the ways this has occurred. In 1905, *United States v. Winans* preserved and expanded core principles of federal Indian law in enhancing rules of treaty interpretation and reaffirming federal authority over states with respect to Indian affairs.¹⁶³ In the 1920s and (to a lesser extent) the 1970s, Pueblo struggles over water had a profound impact in shaping new federal Indian policies that turned away from assimilation and toward tribal self-determination.¹⁶⁴ In the 1960s, the renewed struggle for off-reservation fishing rights led not only to powerful judicial precedents, but catalyzed a new era of unified Indian activism and ultimately a new federal Indian policy.¹⁶⁵ Most recently, the global struggle to maintain natural resources in the face of exploitation by states and multinational corporations moved the world toward a recognition of indigenous rights as human rights.¹⁶⁶

These struggles continue today. Two of the four Indian law cases before the Supreme Court this term affect tribal rights to use natural resources without state interference.¹⁶⁷ Tribes across the country protest oil and mineral exploitation at Bears Ears, Standing Rock, through the proposed XL Pipeline, and many other places.¹⁶⁸ The 2018 report of the UN Special Rapporteur on the Rights of Indigenous Peoples discusses continuing destruction of indigenous natural resources without consultation or consent, and a “worrying escalation” in criminalization and attacks against those

¹⁶² *E.g.*, *Washington St. Dep’t of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1010–15 (2019) (heavily relying on cases regarding off-reservation fishing rights to hold that treaty guaranteeing the right to travel on public highways preempted state taxes on tribal members importing fuel on the highways).

¹⁶³ *See infra* Part I.

¹⁶⁴ *See infra* Part II.

¹⁶⁵ *See infra* Part III.

¹⁶⁶ *See infra* Part IV.

¹⁶⁷ *See* *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019) (concerning off-reservation hunting rights of Crow Tribe); *Sturgeon v. Frost*, 139 S.Ct. 1066, 1080 n.2 (2019) (limiting impact of decision on Alaska Native fishing). A third decision, *Washington State Department of Licensing v. Cougar Den, Inc.*, 139 S.Ct. 1000, 1010–15 (2019), concerned taxation but relied heavily on fishing rights cases.

¹⁶⁸ *See* Gunderson, *supra* note 1 (discussing Standing Rock protests); Allen, *supra* note 12 (discussing Bears Ears conflict); Native American Rights Fund, *XL Pipeline*, available at <https://www.narf.org/cases/keystone/> (discussing suits by the Rosebud Sioux Tribe (Sicangu Lakota Oyate), the Fort Belknap Indian Community (Assiniboine (Nakoda), and Gros Ventre (Aaniiih) Tribes) to halt building the Keystone XL Pipeline).

defendants against such exploitation.¹⁶⁹ But Native peoples' capacity to protect their rights has increased as well. Tribes across the northwest, like tribes across the midwest, work with each other and with states to protect the fish resources they depend upon.¹⁷⁰ Countries as diverse as Canada, Brazil, Finland, and the Congo are recognizing indigenous governance systems in resource management.¹⁷¹ Global environmental change, moreover, creates new partners for tribes in defending their natural resource claims.¹⁷² In all of these efforts, Native peoples find support in the policies, precedents, and principles built in the natural resource fights that came before them.

¹⁶⁹ Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples, at 3–4, A/73/176 (July 17, 2018) (Rapporteur Victoria Tauli-Corpuz) [hereinafter Special Rapporteur Report].

¹⁷⁰ ROBERT ANDERSON, BETHANY BERGER, SARAH KRAKOFF & PHILIP FRICKEY, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 683–84 (2015).

¹⁷¹ Special Rapporteur Report, *supra* note 169, at 16–20.

¹⁷² See, e.g., ZOLTAN GROSSMAN, *UNLIKELY ALLIANCES: NATIVE NATIONS AND WHITE COMMUNITIES JOIN TO DEFEND RURAL LANDS* (2017) (discussing new cooperation between tribes and local farmers, ranchers, and fishers to defend sacred land and water).